

ORIGINAL

MICHAELSON, SUSI &amp; MICHAELSON

A Professional Corporation

ATTORNEYS AT LAW

SEVEN WEST FIGUEROA STREET, SECOND FLOOR

SANTA BARBARA, CALIFORNIA 93101-3191

Telephone: (805) 965-1011

Facsimile: (805) 965-7351

Peter Susi, Bar No. 62957

(SPACED BELOW FOR FILING STAMP ONLY)

006 APR 27 10:55

U.S. BANKRUPTCY COURT  
PATRICIA GRAY, CLERK

Attorneys for Investors

## UNITED STATES BANKRUPTCY COURT

## DISTRICT OF NEVADA

In re	)	Case Nos. BK-S-06-10725 LBR
USA COMMERCIAL MORTGAGE	)	Case Nos. BK-S-06-10726 LBR
COMPANY,	)	Case Nos. BK-S-06-10727 LBR
Debtor.	)	Case Nos. BK-S-06-10728 LBR
	)	Case Nos. BK-S-06-10729 LBR
In re	)	
USA CAPITAL REALTY ADVISORS,	)	Chapter 11
LLC,	)	
Debtor.	)	
In re	)	OPPOSITION TO DEBTORS' MOTION
USA CAPITAL DIVERSIFIED TRUST	)	FOR ORDER APPROVING CASH
DEED FUND, LLC,	)	MANAGEMENT PROCEDURES AND
Debtor.	)	INTERIM USE OF CASH
In re	)	Date: May 3, 2006
USA CAPITAL FIRST TRUST DEED	)	Time: 9:30 a.m.
FUND, LLC,	)	
Debtor.	)	
In re	)	
USA SECURITIES, LLC,	)	
Debtor.	)	

Investors identified on the attached declarations, Exhibit "A" hereto (hereafter "the Objecting Investors"), hereby oppose the Debtors' Motion for Order Under 11 U.S.C. § 105(a), 345 and 363 Approving Proposed Cash Management Procedures and

1 Interim Use of Cash, and in support of their objection state as  
2 follows:

3 I. Statement of Facts

4 The Objecting Investors own individual fractional  
5 interests in various notes and deeds of trust promoted by the  
6 Debtors herein, all as set forth in greater detail in the  
7 declarations attached hereto. In each case, the Objecting  
8 Investor forwarded funds to Debtors as directed and in return  
9 acquired a fractional interest in a discrete loan and deed of  
10 trust originated by Debtors. Debtor, USA Commercial Mortgage  
11 Company, served as the servicing agent for the loan pursuant to  
12 a written loan servicing agreement between that Debtor and the  
13 Objecting Investor, and periodically remitted payments to the  
14 Objecting Investor in accordance with the agreement.

15 Objecting Investors object to the use of interest payments  
16 and/or principal pay downs received in connection with their  
17 respective notes on the grounds that these funds are not  
18 property of this estate, and the Debtors are not authorized to  
19 use these funds under any applicable provision of Sections 105,  
20 345, or 363 of the Bankruptcy Code. Objecting Investors have  
21 not individually received appropriate notice of this motion or  
22 of this case. While Objecting Investors recognize that the  
23 Debtors may well have pressing needs and uses for incoming  
24 funds, these funds are property of the Objecting Investors and,  
25 based upon the showing made to date, the Objecting Investors  
26 are not willing to consent to the use of their funds for the  
27 reorganization of these Debtors.

28

1 Further, the amounts requested by Debtors are excessive  
2 and the motion does not present sufficient detail to support  
3 the request. Financial advisor fees and expenses of  
4 approximately \$150,000 per week and legal fees and expenses of  
5 \$66,700 per week have been requested without further specifics  
6 as to number of employees and specific actions to be performed.  
7 Rather, the motion identifies three general categories of  
8 activities: "(a) continue servicing the loan portfolio; (b)  
9 analyze and investigate the amounts owed to and from each  
10 investor; (c) collect amounts due from borrowers including  
11 commencing foreclosure proceedings or other collection  
12 expenses." Motion, p. 6, line 27 ff.

13 What is not on Debtors' list, but should be Debtors' first  
14 and most immediate priority is determining the performing or  
15 non-performing status of each loan in the portfolio. Only when  
16 Objecting Investors have this information can they  
17 intelligently decide whether and to what extent to support this  
18 reorganization process. Objecting Investors' funds should not  
19 be used for the purposes requested by Debtors. Debtors'  
20 servicing fees only should be applied for these purposes.

21 II. None of the Sections Cited by the Debtors  
22 Authorize the Use of Third Party's Property for the  
23 Reorganization Process.

24 Section 345 of the Bankruptcy Code cited by Debtors is  
25 entitled "Money of Estates" and, as its title suggests, deals  
26 with the use of money of the estate. The funds which Debtors  
27 seek to use by their motion are not money of the estate, but  
28 rather are property of each of the Objecting Investors, to

1 which they each have exclusive claim and title. There is  
2 nothing in Section 345 of the Bankruptcy Code that authorizes a  
3 debtor to use money of third parties.

4 Section 363 of the Bankruptcy Code, while entitled "Use,  
5 Sale or Lease of Property", again deals primarily with property  
6 of the estate and lays out the requirements for use of such  
7 property by the trustee or debtor-in-possession. Objecting  
8 Investors have not seen any authority cited by Debtors under  
9 Section 363, or otherwise, which would authorize the use of  
10 property owned by the Objecting Investors. In fact, the Ninth  
11 Circuit has frowned upon attempts by the trustee to use or  
12 dispose of property until there has first been a determination  
13 that the property is, in fact, property of the bankruptcy  
14 estate. See, for example, *In re Ronald Frederick Popp*, 323  
15 B.R. 260 (9th Cir. BAP 2005), holding that the bankruptcy court  
16 should not have authorized the sale of property free and clear  
17 of liens without first resolving the disputed question of  
18 whether the Chapter 7 estate had an interest in the property  
19 being sold, and citing *In re Rodeo Cannon Development Corp.*,  
20 362 F.3d 903 (9th Cir. 2004) for that proposition. Although  
21 the *Rodeo Cannon* opinion was subsequently withdrawn, the  
22 statement in *Popp* remains good law.

23 Nor do any of the other provisions of Section 363  
24 authorize the use of property of a third party without that  
25 party's consent. Subsection (f) of Section 363 authorizes the  
26 trustee to sell property in which an entity other than the  
27 estate owns an interest free and clear of that interest only  
28 under very limited circumstances, including with the consent of

1 the affected party, or where applicable non-bankruptcy law  
2 would permit sale of such property free and clear of such  
3 interest. None of the enumerated exceptions of subsection (f)  
4 would apply in this case. Here, the property which the Debtors  
5 propose to use is, at least with respect to each Objecting  
6 Investor's fractional share, exclusively owned by the Objecting  
7 Investor. The Debtors have no ownership interest in these  
8 proceeds except insofar as it is entitled to a contractual  
9 servicing fee.

10 III. Conclusion

11 For all of the foregoing reasons, Objecting Creditors  
12 oppose the use of their property as requested by the Debtors  
13 and requests that the court deny Debtors' motion.

14 DATED: April 26, 2006.

15 MICHAELSON, SUSI & MICHAELSON  
16 A Professional Corporation

17 By   
18

PETER SUSI, Attorneys for  
19 Objecting Investors  
20  
21  
22  
23  
24  
25  
26  
27  
28



DECLARATION OF BERNARD SANDLER

I, Bernard Sandler, declare:

1. I am a resident at 99 La Vuelta, Santa Barbara, California. I have personal knowledge of the matters set forth herein and am competent to testify thereto.

2. I am a trustee of the Bernard Sandler and Linda Marie Sandler Revocable Intervivos Family Trust dated 9/13/91, which currently owns a pro rata portion of the following trust deeds which were promoted by USA Capital:

<u>Borrower</u>	<u>Face Amount of Note</u>	<u>My Investment</u>
Elizabeth May Real Estate, LLC	\$10,500,000	\$ 75,000
Shamrock Tower, LP	\$ Unknown	\$100,000

3. I do not consent to the proposed use of my funds in the Bankruptcy Case of USA Capital Mortgage, Inc. or its affiliates.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 25 day of April, 2006, at Santa Barbara, California.

  
BERNARD SANDLER

DECLARATION OF DAVID E. GACKENBACH

I, David E. Gackenbach, declare:

1. My address is 12240 North 128th Place, Scottsdale, Arizona 85259. I have personal knowledge of the matters set forth herein and am competent to testify thereto.

2. I am the trustee of the David E. Gackenbach Revocable Trust of November 10, 1999, and the beneficiary of the David E. Gackenbach IRA, which currently own a pro rata portion of the following trust deeds, which were promoted by USA Capital:

<u>Lender</u>	<u>Borrower</u>	<u>Face Amount of Note</u>	<u>My Investment</u>
David E. Gackenbach Revocable Trust	Elizabeth May Real Estate LLC	\$10,500,000	\$ 100,000
David E. Gackenbach IRA	Gramercy Court Ltd.	\$30,879,500	\$ 150,000

3. I do not consent to the proposed use of my funds in the Bankruptcy Case of USA Capital Mortgage, Inc. or its affiliates.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 25 day of April, 2006, at 12240 N. 128th Pl.

Scottsdale, AZ 85259

  
DAVID E. GACKENBACH



DECLARATION OF SUSAN GACKENBACH

I, Susan Gackenbach, declare:

1. My address is 12240 North 128th Place, Scottsdale, Arizona 85259. I have personal knowledge of the matters set forth herein and am competent to testify thereto.

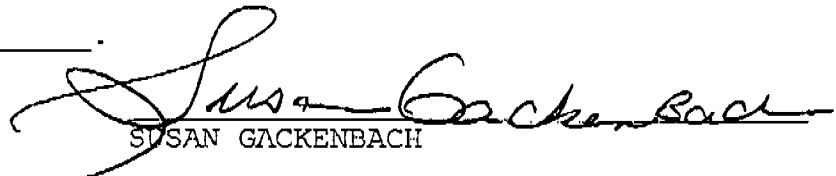
2. I am the trustee of the Susan F. Stein Trust of February 12, 2000, and the beneficiary of the Susan F. Gackenbach IRA, which currently own a pro rata portion of the following trust deeds, which were promoted by USA Capital:

<u>Lender</u>	<u>Borrower</u>	<u>Face Amount of Note</u>	<u>My Investment</u>
Susan F. Stein Trust	Palm Harbor One, LLC	\$29,000,000	\$ 100,000
Susan Gackenbach IRA	Gramercy Court, Ltd.	\$30,879,500	\$ 200,000
Susan Gackenbach IRA	Fox Hills 216, LLC	\$25,755,000	\$ 150,000
Susan Gackenbach IRA	Elizabeth May Real Estate LLC	\$10,050,000	\$ 200,000

3. I do not consent to the proposed use of my funds in the Bankruptcy Case of USA Capital Mortgage, Inc. or its affiliates.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 26 day of April, 2006, at 10:00 AM.

  
SUSAN GACKENBACH

DECLARATION OF CONNIE COBB

I, Connie Cobb, declare:

1. I am a member of the firm of Hocking Denton Palmquist located at 1485 East Valley Road, Montecito, California.

2. I hold a power of attorney for Jay Stein. I have personal knowledge of the matters set forth in this declaration and am competent to testify thereto. Mr. Stein, in various capacities, holds investments in the following trust deeds, which were promoted by USA Capital:

<u>Lender</u>	<u>Borrower</u>	<u>Face Amount of Note</u>	<u>My Investment</u>
Jay S. Stein Trust 12/12/00	Fox Hills 185, LLC	\$29,975,000	\$ 100,000
Jay S. Stein Charitable Remainder Unitrust of 7/15/02	Palm Harbor One, LLC	\$29,000,000	\$ 200,000
Jay S. Stein Charitable Remainder Unitrust of 7/15/02	Fox Hills 216, LLC	\$25,755,000	\$ 225,000
Jay S. Stein IRA	Fox Hills 185, LLC	\$29,975,000	\$ 100,000
Jay S. Stein IRA	Urban Housing Alliance, LLC	\$ 7,970,000	\$ 100,000
Jay S. Stein IRA	60th Street Ventures, LLC	\$ 3,700,000	\$ 200,000
Jay S. Stein IRA	Oak Mesa Investors, LLC	\$20,500,000	\$ 100,000

3. Mr. Stein does not consent to the proposed use of his funds in the Bankruptcy Case of USA Capital Mortgage, Inc. or its affiliates.

1 I declare under penalty of perjury that the foregoing is  
2 true and correct.

3 Executed this 26th day of April, 2006, at Santa Barbara,

4 California.

5 Connie Cobb

6 CONNIE COBB

DECLARATION OF ROBERT J. ROWLEY

I, Robert J. Rowley, declare:

1. I am a resident at 398 Arboleda Road, Santa Barbara, California. I have personal knowledge of the matters set forth herein and am competent to testify thereto.

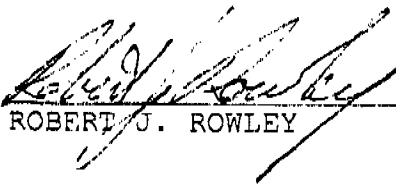
2. I am a trustee of the Robert J. Rowley and Kathleen M. Rowley Living Trust, which currently owns a *pro rata* portion of the following trust deeds which were promoted by USA Capital:

<u>Borrower</u>	<u>Face Amount of Note</u>	<u>My Investment</u>
ComVest Capital Advisors	\$ 4,500,000	\$100,000
Marlton Square Associates, LLC	\$30,000,000	\$ 60,000

3. I do not consent to the proposed use of my funds in the Bankruptcy Case of USA Capital Mortgage, Inc. or its affiliates.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 26<sup>th</sup> day of April, 2006, at Santa Barbara, California.

  
ROBERT J. ROWLEY

DECLARATION OF SERVICE

CHERYL NICCOLI, the undersigned, hereby declares:

Declarant is a citizen of the United States and is employed by the law firm of Michaelson, Susi & Michaelson, a Professional Corporation, Seven West Figueroa Street, Santa Barbara, CA 93101. Declarant is over the age of 18 years and is not a party to the within action.

On the 26th day of April, 2006, at the direction of PETER SUSI of said firm and a Member of the Bar of the United States District Court for the Central District of California, I served the:

OPPOSITION TO DEBTORS' MOTION FOR ORDER APPROVING CASH MANAGEMENT PROCEDURES AND INTERIM USE OF CASH

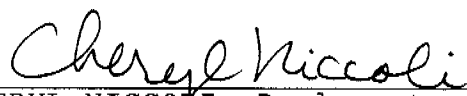
on the interested parties in this matter by:

( ) mailing, with postage thereon fully prepaid; ( ) personally delivering; ( ) sending via FAX transmission with confirmation of transmittal by follow-up telephone call and transmit confirmation report to the individuals at the addresses and FAX numbers listed below; or (x) sending via overnight carrier, a true copy thereof, to said party at his, her, or their known address, to wit:

-SEE ATTACHED LIST-

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Santa Barbara, California, on the 26th day of April, 2006.

  
CHERYL NICCOLI, Declarant

Office of the U.S. Trustee  
Attention Augie Landis  
300 Las Vegas Boulevard South  
Suite 4300  
Las Vegas, NV 89101

Gordon & Silver, Ltd.  
Attention Jerry Gordon  
3960 Howard Hughes Pkwy.  
Ninth Floor  
Las Vegas, NV 89109

Annette W. Jarvis  
P.O. Box 45385  
Salt Lake City, UT 84145

Jeanette E. McPherson  
2850 S. Jones Blvd., Suite 1  
Las Vegas, NV 89146

Lenard E. Schwartzer  
Schwartzer & McPherson Law Firm  
2850 S. Jones Boulevard, Suite 1  
Las Vegas, NV 89146

Richard McKnight  
330 S. Third Street, #900  
Las Vegas, NV 89101